

7
November 20. 1753.

INFORMATION

FOR

CHARLES SCHAW of Sauchie, Lord
Cathcart, *Defender,*

AGAINST

John Stewart Nicolson Schaw, Heir of Tailzie of
the Estate of *Greenock*, and *Sir Michael Stewart*
of *Blackball*, Bart. his Father and Administra-
tor in Law, *Pursuers.*

SIR *John Schaw* of *Greenock*, Great Grand-father to
the Defender, of this Date made a Settlement of his
Estate of *Greenock*, holden Tax-ward of the Prince,
in favours of himself in Liferent, and of *John Schaw*
his eldest Son, the Defender's Grand-father, and the Heirs-
male of his Body in Fee, with a Substitution in favours of *Sir*
John Schaw's three younger Sons, and the Heirs-male of
their respective Bodies, and of any other Heirs-male to be
afterwards procreate of *Sir John Schaw's* Body, whom fail-
ing, to the Heirs-female of *Sir John Schaw's* Body, the eldest
succeeding without Division; whom failing, to the collateral

May 11th,
1685.

A

Heirs-

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Heirs-male of Sir *John*; whom all failing, to the Heirs and Assignies whatsoever of *John Schaw* the Son.-----And upon this Settlement a Charter under the Great Seal was expedited in 1687, and thereupon the Father and Son were duly infeft.

By this Infeftment, the absolute Property of the Estate of *Greenock* was vested in *John Schaw* the Son, subject to his Father's Liferent, and descendible to the Heirs-male of his Body; and failing Heirs-male of his Father's Body, descendible to the Heirs whatsoever of *John Schaw* the Son's Body, who were also Heirs-female and of Line of the Father's Body.

March 1st
1700.

But it appears, that this Right to the Estate of *Greenock*, vested in *John Schaw* the Son, and descendible to the Heirs of his Body, was not attended to in the Contract of Marriage between him and Mrs. *Margaret Dalrymple* eldest Daughter to Sir *Hugh Dalrymple* of *North-Berwick*, Lord President of the Session, of this Date, and which gives Occasion to the present Question; for by that Contract Sir *John Schaw* the Father, upon the Supposition that the Right to the Estate had remained with him, becomes bound jointly with his Son to resign, and grants Procuratory for resigning the Estate in favours of himself in Liferent, and of his Son, and of the other Heirs of Tailzie therein mentioned in Fee; and thereby imposes upon his Son as well as upon his Heirs of Tailzie therein mentioned, the usual Clauses in strict Entails, of not altering the Course of Succession, of not aliening, of not charging the Estate with Debts, with the usual irritant Clauses in case of Contravention; but also he prefers his own Daughter Mrs. *Margaret Schaw*, and the Heirs whatsoever of her Body to the Heirs whatsoever descended of his Son the Proprietor's Body, and to the lineal Heirs the female Descendents of his younger Sons, who were Heirs of Line both to Father and Son, and who were expressly called

in

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in their proper Order by the Infestment 1687, preferable to any Daughter of Sir *John* the Father.

It does not now with Certainty appear whether the Bride's Friends were ignorant of the Son's Right to the Estate established by the Infestment 1687, and thereby were induced to submit to the Settlement of the Estate, as if it had absolutely belonged to the Father, to the Restrictions upon the Son's Fee; and to the *unnatural* Preference given to Sir *John's* Daughter, to his own and his Son's lineal Heirs; or if they considered the Chance of the Succession's opening to Heirs of Line to be so distant, as Sir *John* had then six Sons, who and their male Descendents were by the Son's Infestment preferred to the Heirs of Line, that it was thought immaterial to consider the Succession of the Heirs of Line, substitute to six Males, all of perfect Age, and their male Issue. And with respect to the Restrictions imposed upon the Son in common with the Heirs of Tailzie, these also possibly were thought to be of no Consequence; and that, not only because it was provided that the Father and Son might jointly take off all these Restrictions, but also because it was at that Time thought, that though in Terms of the Act of Parliament 1685, a Proprietor might restrain his Heirs by irritant and resolute Clauses, yet it was not then known or supposed, that a Proprietor could restrain himself in favours of his own Heirs: And also in respect of the Reservations in Favours of the Son, that as by the Contract of Marriage a reasonable Jointure was provided to his Wife, so he had reserved Power of providing a second Wife, and Provisions were made to the Daughters of the Marriage, and which he had Power to augment, and the Son had an unlimited Power to set Tacks and grant Feus of the Estate, except *quoad* the Houses and Yards that were then upon the Estate, with respect to these the Feu-duty is limited by the Contract.

Soon after the Date of the Contract of Marriage, Sir *John Schaw*, the Father, published the same in the Record appointed

2d Feb.
1702.

ed by the Act of Parliament 1685, namely of this Date, and soon thereafter Sir *John Schaw*, the Father, died.

Some time after this, Sir *John Schaw*'s five younger Sons died without Issue; and as the elder Brother Sir *John* had no Male Issue, his Sister Mrs. *Margaret Schaw* who had then intermarried with Sir *John Houstoun* became next Heir of Tailzie. And not to mention many other Law-suits that occurred between her and her Husband, and Sir *John Schaw*, it will be sufficient to observe, that she brought an Action of Exhibition of the foresaid Contract of Marriage, and for Registration thereof in the Books of Council and Session; and Sir *John Schaw* having appeared to this Action, and having repeated a counter Declarator, that he had Power to alter the Destination of Succession in the Contract of Marriage, and consequently that the Sister had no Interest to pursue for Exhibition or Registration thereof: The Lords at first found Sir *John* had a Power to alter; but upon a Review, they found that Sir *John* could not alter the Settlement, and ordained the Contract to be registrated; and upon an Appeal brought, this Decree was affirmed by the House of Lords.

15th and
28th
March
1718.

By Marriage Articles of this Date, between *Charles* Lord *Cathcart*, Father to the Defender, and Mrs. *Marion Schaw*, only Daughter of the foresaid Marriage between Sir *John Schaw* and Mrs. *Margaret Dalrymple*, the said Sir *John Schaw* obliged himself, and his Heirs of Tailzie succeeding to him in the Estate of *Greenock*, to content and pay to the Lord *Cathcart*, the Sum of 50,000 Merks of Tocher with his Daughter, within Year and Day after Solemnization of the Marriage, with Interest from the Marriage; and the Lord *Cathcart*, among other Things, became bound to secure the Tocher upon Land, or upon Security bearing Interest to himself and the Heir-male of the Marriage, whom failing, to the Heirs-male of Lord *Cathcart*'s Body of any subsequent Marriage, whom failing to the Heirs-female of the Marriage, &c.

In

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In Implement of the foresaid Marriage-articles, Sir *John Schaw* of this Date, granted three heritable Bonds, the first for 30,000 Merks; the second for 17,000 Merks, and the Third for 3000 Merks, all payable at *Whitsunday* 1719, with Interest from the 29th of *March* 1718, the Date of the Marriage between Lord *Cathcart* and Mrs. *Marion Schaw*; each of the Bonds contain an Obligation upon Sir *John* and his *Heirs of Tailzie in the Estate of Greenock*, to pay the foresaid Sums; a Procuratory of Resignation and Precept of Sasine for infesting the Lord *Cathcart*, and his Heirs, in an Annualrent effeiring to the said respective Sums, uplifiable out of the Estate of *Greenock*; and an Obligation upon the Heirs of Tailzie succeeding to the said Estate, to relieve Sir *John's* other Heirs and Successors of the foresaid Sums, Principal, Annualrents and Penalty.

18th Sep.
1718.

There is this Variation between the three Bonds; that the first for 30,000 Merks, is granted in Implement of the Obligation upon Sir *John* and his Heirs of Tailzie, by the Contract of Marriage 1700, to pay the Sum of 30,000 Merks to an only Daughter of that Marriage, with Interest, after her Age of Sixteen, or Marriage; and the other two Bonds for the 20,000 Merks, are granted in exercise of the Powers reserved to Sir *John*, to contract the Sum of 50,000 Merks of Debt, and therewith to affect and burden the tailzied Estate, for providing of his Daughters or younger Children; and the Defender is Heir of Provision to his Father, the Lord *Cathcart*, in all these three Bonds.

The foresaid Contract of Marriage 1700, contains the following Clause, viz. ' Reserving also, notwithstanding of the ' Premisses, full Power and Liberty to the said Sir *John Schaw*, and after his Death to the said *John Schaw* his ' Son, and the Heirs of Tailzie and Provision above specified, to grant Feus or long Tacks for such Spaces as they ' shall think fit, of any Part or Portion of the said Lands; ' the Feu or Tack-duty not being under 20 s. Scots, for each

B

Fall

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• Fall of Dwelling-houses, and 5 s. Scots, for the Fall of
• Yards and Office-houses.

Pursuant to this Reservation, as Sir *John Schaw*, the Father, feued out Part of the Eight Pound Land of *Broadstone*, for Payment of 40 s. Scots of Feu-duty: So after his Death Sir *John Schaw*, the Son, feued out some of the Houses, Offices and Yards, in the Town of *Greenock*, which were formerly his Property, and of which the Rent was scarce sufficient to answer to the Charge of upholding, and that at the Feu duties mentioned in the Clause, viz. 20 s. for the Fall of Dwelling-houses, and 5 s. for the Fall of Yards and Offices.

But as a great Part of the Town of *Greenock* still remained the Property of Sir *John Schaw*, extending to 19 Acres, 2 Roods and 35 Falls, and 12 Ells; this Residue Sir *John Schaw* the Son, of this Date, feued out to his Daughter the Lady *Cathcart*, and her Heirs therein mentioned, for Payment of the Feu-duty mentioned in the Clause, viz. 20 s. for the Fall of Dwelling-houses, and 5 s. for the Fall of Offices and Yards, and Lady *Cathcart* was duly infeft therein, and entered and continued in Possession during her Life; and since her Death, the Defender her Heir in the Premisses, hath continued the Possession thereof, having obtained a Precept of *Clare* from Sir *John Schaw* his Grandfather, the Superior.

And further, in pursuance of the same Faculty, Sir *John Schaw*, of this Date, feued out to the Defender the old Mansion-house of *Greenock*, which Sir *John* had found almost ruinous, and which he rebuilt, and the Offices and Gardens which he himself had built, and laid out; but still observing the Regulation in his Contract of Marriage, with respect to the Feu-duty of Dwelling-houses, Yards and Offices.

And last of all, of this Date, Sir *John* feued out the Lands of *Wester Greenock*, *Finnart* and others, to the Defender, at the full Rent they presently pay, with an Addition of a Feu-

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3d August
1719.

2d Sept.
1751,

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1st Nov,
1751.

Feu-duty for the Dwelling-houses, Yards and Offices, and Sir *John* died in *April* 1752.

Margaret Schaw, Sir *John's* Sister, and Heir of Tailzie, intermarried, as hath been said, with Sir *John Houston* of *Houston*, by whom she had Issue, a Son and two Daughters; her Son died without Issue during the Life of his Mother and of Sir *John Schaw*; his eldest Daughter *Anne* intermarried with Sir *Michael Stewart* of *Blackhall*, and she is since dead, leaving Children; and her eldest Son, this Pursuer, having first succeeded to his Grandmother the Lady *Houston's* Estate of *Carnock* and *Plane*, under a strict Entail, hath now also succeeded to Sir *John Schaw* in the Estate of *Greenock*.

And Sir *Michael Stewart* hath, in Behalf of his Infant Son, brought a Reduction of all the Deeds above mentioned, granted by Sir *John Schaw* to the deceas'd Lord *Cathcart* or to his Lady, Sir *John's* Daughter, or to this Defender Sir *John's* Grandson; namely, of the Portion covenanted to be paid by Sir *John Schaw* to the Lord *Cathcart* by the Marriage-articles between Lord *Cathcart* and his only Daughter, and the Securities granted upon the Estate of *Greenock* for Payment of the Portion, at least in so far as concerns the Interest that hath fallen due during the Life of Sir *John Schaw*; the Feu-right of the Houses, Yards and Offices in the Town of *Greenock*, the Feu-rights of the House and Gardens built and laid out by Sir *John Schaw*, and the Feu of the Lands of *Wester Greenock*, *Finnart*, &c. And the Production being satisfied, and a Remit to an Ordinary to discuss the Reasons, the Cause was heard before the Lord *Elchies*; and it appearing to his Lordship, that this Reduction was of that Importance, that it fell to be heard in Presence, in the Terms of the Articles of Regulation 1672, he declined giving Judgment upon the Debate; and upon the Application of both Parties, the Cause was heard at great Length in your Lordships Presence, and Informations were directed to be given in; this is offered in Behalf of the Defender.

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The Reasons of Reduction were founded on the Tailzie of the Estate of *Greenock*, contained in the Contract of Mariage 1700, and the Prohibitions to alien and to charge the Estate with Debts, in Prejudice of the Heirs of Entail; and particularly of Mrs. *Margaret Schaw*, the Pursuer's Grandmother, and the Heirs whatsoever of her Body, and which Settlement had been found unalterable by a Decree of this Court, affirmed by the House of Lords; that contrary to the Spirit and Intention of this Tailzie, and of those Decrees, Sir *John Schaw* had attempted, in an *indirect* and *illegal* Way, to destroy the Tailzie, by charging it with an exorbitant Jointure to his Wife, now his Widow, by burdening the same with 50,000 Merks and the bygone Interest; by feuing out the principal Messuage, the Burgh of Barony, and another valuable Part of the rest of the Estate, and thereby transmitting to the Heir of Entail only the Superiority of the Estate in place of the Property, and that burdened with a Life-rent, and an Annualrent, which, during the Subsistence of the Life-rent, would render the Estate in a great measure useless to the Pursuer, the Heir of Tailzie; and hard Names were bestowed upon all and every one of those Deeds under Reduction.

It was answered for the Defender, That as the Widow's Jointure had been sustained by an unanimous Judgment, acquiesced in by the Pursuer; and therefore the Objections made there-to could not influence the present Question: So that *quoad* the Deeds now quarrelled, it was first in the general undeniable, that by the Infeftment 1687, Sir *John Schaw* the Son was unlimited Proprietor of the Estate of *Greenock*, that it was descendible to his own Issue, failing Heirs-male of his Father's Body; and that Sir *John* the Son had thereby Power to prefer his own female Descendents to his Brothers and their Male-Issue. This was the State of Sir *John* the Son's Right to this Estate, at the Date of this Contract of Marriage; and if he was induced by the Authority of his Father, by his Contract of Marriage, to *restrain* himself in the free Use of his Property

Property, and made to *disinherit* his own Issue; it cannot be thought strange, or unnatural, that he tried all legal Methods to be restored to his Property; and when these failed, that he exercised all the Powers given him by the Contract of Marriage, in favours of his own Issue, in exclusion of this Pursuer, a Stranger to his Family, and who has no equitable Right to succeed to his Estate, while there remains Issue of his own Body, who do not deserve to be disinherited: And on that Account, that the Deeds in question, so far as they are within the Powers reserved to Sir *John* by his Contract of Marriage, are not only *legal*, but just and laudable Exertions of his Powers.

2dly, That tho' Tailzies, whereby the lineal and legal Course of Succession is cut off, and whereby Strangers are preferred to a Person's lineal and natural Heirs, are allowed of in our *Feudal Law*, which authorises the Preference of distant collateral Heirs-male, to one's Female Descendents, upon military Considerations; yet from the Beginning it was not so: Nature hath implanted in Mankind, and indeed in all the animal Creation, a happy Instinct, a Love to their own Progeny; in so much that Men consider themselves as possessing what they give to their Children; *and he is worse than an Infidel that does not provide for his own Family*; but sends the Fruits of his Labours to those of another Family.— And the Tailzie in question hath not even the feudal Plea upon its Side, the Preference of the Males to the Females; for here Sir *John's* Sister and her Descendents of whatever Kind, Male or Female, are preferred to Sir *John's* own Daughter, and to his Descendents by her; and for that Reason also Sir *John* deserves no Reproach when he followed the Dictates of the Law of Nature, in exercising the Powers that were left him, by this *unnatural* and even *unfeudal* Entail, in favours of his own Children.

3dly, That Property is a natural Right of Mankind, given to Man at his first Creation, and renewed to *Noah* after

Act of Par-
liament
1685.

the Flood; *God hath given the Earth to the Sons of Men*; and therefore, though our Law hath allowed a Proprietor to *tailzie* his Estate, and to limit his Heirs that they shall not have the Property, either the Power of disposing or charging it with Debts during their Life, or transmitting it to their Heirs after their Death; and to this Law we must submit while it stands; yet it is an unnatural Constitution, and which the Scripture brands with the Name of *Folly*; and upon that Account, those Restrictions upon Property have received the strictest Interpretation from this, and all the other Courts of the Nation, that those Fetters may be worn by the Proprietor in the easiest Manner; and the Powers incident to Property, reserved to the Tenant in Tail, ought to receive the most beneficial and largest Construction.

But the present Tailzie doth not even fall under the Act of Parliament; the Act concerns only the Limitations upon Heirs named by the Proprietor, the Maker of the Tailzie; it makes no Provision for a Man's limiting himself and his Property, in favours of his Heirs, or for a Liferenter imposing Restrictions upon the Fiar, to take Place after the Determination of the Liferent: But here the Proprietor Sir *John Schaw* the younger, submits to his being limited in the Exercise of his Property, by his Father, who was divested of the Property by the Infestment 1687, and therefore this unnatural and illegal Limitation ought not to be extended, but the Powers reserved to the Proprietor, must, in his favour, be interpreted in the most extensive and beneficial Manner.

And more particularly with respect to the Sum of 50,000 Merks, covenanted by the Marriage Articles 1718, to be paid to the Lord *Cathcart*, as a Portion with Sir *John Schaw's* only Daughter, and the Securities granted to the Lord *Cathcart*, and the Heirs of the Marriage, upon the Estate of *Greenock*, they are founded in the express Words of the Tailzie, contained in the Contract of Marriage 1700. The Words are,

And

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• And 'tis hereby provided and declared, &c. That it shall be
 • lawful, and in the Power of the said *John Schaw*, or any
 • of the said Heirs of Tailzie, to contract the Sum of 50000
 • Merks Scots Money of Debt, and therewith, to affect and
 • burden the said Lands and Estate, for providing of their
 • Daughters and younger Children, &c.' By this Clause
John Schaw the Son is delivered from the Restraint im-
 posed upon his Property, by the general Prohibition to
 charge the Estate with Debts; and he is made unlimited Pro-
 prietor of the Estate, to the Extent of this Sum of 50,000
 Merks; and he is in the same Case with respect to this Sum,
 as he was before the Contract of Marriage, or as any other
 unlimited Fiar; he was at Liberty to contract this Sum, and
 to charge it upon the Estate, to grant an Infeftment of Annu-
 alrent effeiring to this Sum, upon the tailzied Estate, or to grant
 personal Security for this Sum and Annualrents; upon which
 Adjudication of the Estate might follow for the principal Sum
 and Annualrents; and which Adjudication, though it is de-
 clared by the immediate subsequent Clause in the Entail, that
 it should not expire or become a Right of Property, yet it is
 also declared, that such Adjudication should in other Respects
 have its legal Effects, *i. e.* ' That it should only be redeem-
 • able upon paying the Sums for which the same shall be ob-
 • tained with the Annualrents thereof.' So that if Sir *John*
Schaw the Son, antecedent to the Contract of Marriage, had
 Power to charge the Estate with Debts bearing Annualrent,
 and to grant heritable or personal Securities, bearing Interest,
 and chargeable upon the Estate; or if any other unlimited
 Proprietor hath Power to charge his Estate with Debts to its
 Value; Sir *John Schaw* the Son has by this Clause the same
 unlimited Power to charge the tailzied Estate of *Greenock* with
 Debt, to the Extent of 50000 Merks, bearing Interest, for Pro-
 vision of his Children, not succeeding to the Estate.

And that this Faculty extended not only to the principal
 Sum of 50000 Merks, but to the Annualrents thereof from the
 Time

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Time that it should be contracted, is apparent from the Clause for providing the Daughters of the Marriage, in case there should be no Issue-male thereof; and which Clause providing the Daughters is expressly declared to be an Exercise of this Faculty competent to Sir *John* the Son.

By the Clause providing the Daughters, the Father and Son bind themselves, 'and their Heirs-male and of Tailzie, succeeding to them in the foresaid Lands and Estate,' to pay to three or more Daughters of the Marriage, the Sum of 50000 Merks, at their several Ages of sixteen Years compleat, or at their respective Marriages, with [the Sum of 100 Merks as liquidate Expences for ilk 1000 Merks of their several Portions, with the Annualrents of the same respective Portions, during the not Payment thereof, after the several Terms of Payment above-mentioned. This Exercise of this reserved Power to burden the tailzied Estate, and the Heirs of Tailzie with 50000 Merks, and the Annualrents thereof, made in the Contract of Marriage, wherein the Faculty was reserved, and declared to be in Exercise of the Faculty, is, with Submission, a Demonstration that it was clearly intended by all the Parties to the Contract, and to the Tailzie, that Sir *John Schaw* the Son had Power to charge the entailed Estate, and to burden the Heirs of Tailzie with the Payment of 50000 Merks, and the Annualrents thereof, for the Provision of his Daughters or other Children not succeeding to the Estate, in the same Manner as he could have done, had he been under no Restrictions whatsoever by the Tailzie.

And as, in consequence of this Faculty, Sir *John* has by the Securities granted to the Lord *Cathcart*, and this Defender, charged the Sum of 50,000 Merks, and the Interest thereof from the Time of his Daughter's Marriage, upon the entailed Estate; and has bound the Pursuer, and his other Heirs of Tailzie, to pay this principal Sum and Annualrents, and to relieve his Heirs of Line and his other Successors thereof; they must submit to this Obligation, and can have no

Relief

Relief against the Defender, or the other Representatives of Sir *John Schaw* the Son.

And as the Pursuer pointed his Reduction chiefly against the Annualrents of the 50,000 Merks that had fallen due during the Life of Sir *John Schaw*, the Son; that *quoad* these Annualrents, he was entitled to Relief against the Heir of Line of the Granter of the Securities; the Defender will be allowed to consider this Matter more particularly. And, 1st, He is advised, that though the Debts of a Defunct are binding upon all his Representatives, his Heirs of whatever Kind, and his Executors; yet the *Law* hath established a Right of *Relief* between Heirs and Executors; the Executor is *ultimately* liable to the Defunct's moveable Debts, and the Heir to his heritable Debts, and they have mutual Relief accordingly against one another. Again, the Heirs are all liable to the Defunct's heritable Debts, and they have not only mutual Relief against one another; but the Heirs of Line and Heirs of Conquest must be first discussed, before the Creditor can claim from an Heir of Tailzie, or of Provision: These are the Rules established by Law; but at the same Time it is in the Power of the Defunct to dispense with all these Rules, he may oblige his Heir to relieve his Executry of his moveable Debts, or *è contra*; he may dispense with the Benefit of Discussion among his Heirs, and he may oblige his Heir of Tailzie to relieve his Heir of Line, or his Executors, of all his Debts, and his Will will be the sovereign Rule, whether it be expressly declared by obliging his Heir of Tailzie to relieve his other Representatives, or if it be done virtually by imposing a Debt upon the Estate befalling to the Heir of Tailzie; these Things the Defender is advised are Principles of the Law of *Scotland*, and it were improper to prove them by Authorities or Decisions.

To apply these Principles to the present Case, Sir *John Schaw*, the Son, was unlimited Fiar of the entailed Estate, *quoad* the Sum of 50,000 Merks, and the Interest there-

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of; he had the same Power of burdening the entailed Estate with this Sum, as if he had been unlimited Fiar: Wherefore as he hath exercised this Power, hath charged this Sum, Principal and Interest, on the entailed Estate, and has bound his Heirs of Tailzie to relieve his other Estate, Sir John's Will must bind his Heir of Tailzie, to pay without the Benefit of Discussion, and without Relief against Sir John's other Heirs; on the contrary, he is bound to relieve Sir John's other Heirs of the same.

It was objected for the Pursuer, that an Heir of Tailzie, though he may take Assignment to the Tailzier's Debts, and keep them up against the tailzied Estate; yet *quoad* the Annualrents incurred during his Possession, he and his Successors in his own Estate, are bound to relieve the Heirs of Tailzie of these Annualrents, upon the same Principles, that one having an universal Liferent of an Estate, whether by Paction or by Law, suppose by Courtesy, is obliged to pay the current Annualrents affecting the Estate.

It is answered, 1st, A Party having an universal Liferent, has only Right to the annual Profits of the Subjects during his Life; and as he is by Law obliged to leave the Subject liferented, in as good Condition as he finds it, so he is under an implied Obligation to discharge the annual Burdens, because his Liferent is understood to be with Deduction of those Burdens; and therefore, if he intromits with the Sums necessary for discharging those Burdens, he intromits beyond his Right, and is liable in Repetition, and in Relief, to the Fiar, who may be liable in Payment.

But the Case of an Heir of Entail is quite different from that of a Liferenter: For as an Heir of Entail is under no Obligation to leave the Subject entailed in as good Condition as he finds it; so he is to be considered in every respect as an absolute Fiar, having full Powers over the Estate, unless in so far as he is limited; and it is now an established Principle, that such Limitations cannot be extended by Implication, or from

from presumed Intention; but all Limitations upon an Heir of Tailzie, who is Proprietor of the tailzied Estate, must be imposed by plain and exprefs Words: And therefore though it is admitted, that an Entail containing an exprefs Obligation upon the several Heirs of Tailzie, to pay the annual Burdens incurred during their Possessions respectively, will have its legal Effect, and entitle the subsequent Heir of Tailzie to Relief out of any separate Estate belonging to the Contraveener; yet where the Tailzie contains no such Clause, it cannot be supplied from presumed Intention; but the subsequent Heir must take the Estate subject to the Burdens with which it stands legally affected, and will have no Relief out of any separate Estate, which might have belonged to the Heir last in Possession.

And therefore to apply what has been said to the present Case. As the Defender does not deny, that not only Sir *John*, but also the several Heirs of Tailzie, who may succeed to him, have Power to burden the Estate with 50,000 Merks, and the Annualrent thereof for the Provision of Daughters or younger Children; and as the Tailzie contains no Clause obliging either Sir *John*, or the subsequent Heirs, to clear these Annualrents during their own Lives; this Obligation will not be supplied by Implication, nor from presumed Intention; but the Defender must take the Estate subject to these Burdens with which it stood affected at the Death of his Predecessor.

And it adds no small Weight to this Argument, that the Entail which gives Rise to the present Question, contains an exprefs Clause, obliging the several Heirs under an Irritancy, 'To pay the Casualties of Superiority and publick Burdens, and not to suffer the same to run on, so as that thereby the Estate might be evicted.' But as the Entail contains no such Obligation with regard to the Annualrent of Debt imposed in Terms of the Tailzie; it must be presumed, that it was not
the

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the Intention of Parties, either that the Heirs should forfeit the Estate by allowing these Annualrents to run on, or that the subsequent Heir of Tailzie should have Relief of these Annualrents out of any separate Estate, which might have belonged to the Heir, who had allowed these Annualrents to run on unsatisfied.

But be that as it will, it is nothing to the present Question, where the Proprietor reserves a Power to himself to charge his Estate with the Sum of 50,000 Merks, and the Annualrents; in such a Case he is so far under no Restraint, he is neither Liferenter nor under any Limitation, but he is absolute Fiar; and *quoad* this Sum, he is in the same Condition with respect to his Heirs of Tailzie, as if no Tailzie had been made, and as if the Heirs of Tailzie took the Estate under him as Heirs of Provision.

Hitherto the Argument hath proceeded, with respect to the whole Sum of 50,000 Merks, with which Sir *John Schaw* the Son is impowered to burden the Estate; and with respect to the whole Sum, Sir *John* is in the State of an absolute and unlimited Fiar, with this only Exception, that 'tis declared by the Contract, that an Adjudication proceeding thereon shall never expire; and this is the only Restriction upon Sir *John Schaw* with respect to his contracting this Debt: But then with respect to the 30,000 Merks, Part of this Sum provided to the only Daughter of the Marriage, it stands on a separate Foundation; for *quoad* this Sum, it is *expressly* declared, that the Tailzie should nowise affect the same. The Words are these: 'Declaring also, that this present Tailzie, and Irritancies thereof, are, and shall be nowise prejudicial to any Execution competent upon this Contract, in so far as the same is conceived in Favours of the said Mrs. *Margaret Dalrymple*, and the Daughters of the Marriage, failing of Heirs male thereof.' This is an express Declaration, that the Provision of 30,000 Merks to the only Daughter of the Marriage, with Interest and Penalty, should be held in the same Condition

Condition as if there had been no Tailzie of the Estate, but Sir *John* the Son had remained absolute and unlimited Proprietor thereof; and if so, that he had full Power to charge the same, the Annualrents as well as the principal Sum, upon the Heirs of Tailzie succeeding to the Estate, and might oblige them to relieve his Heirs of Line, &c. that Diligence by Adjudication might proceed against the Estate, for Payment of the Daughters Provision, Principal and Annualrents, and that the Legal of such Adjudication might expire, according to the common Course of Law, which is the chief Thing intended as a Difference between the Daughters Portions stipulate by the Contract, and the other Exercise of this Faculty competent to Sir *John*, tho' the Clause is conceived generally, that these Portions should not be affected by the Tailzie; but *quoad* them, Sir *John* was absolute Fiar, and might burden his Heirs of Tailzie with relieving his other Successors of the same.

And accordingly, in the Clause of the Contract of Marriage, which directly concerns these Provisions, the Father and Son expressly bind themselves and their Heirs of Tailzie, succeeding to them in the tailzied Estate, to pay the Provisions to the Daughters of the Marriage, with Interest, from their Age of sixteen or Marriage, and Penalty: And 'tis declared, that the Lands and Estate of *Greenock* shall be the Subject where-with the said Portions to the Daughters is to be burdened.

After this, is it possible to maintain, that it was intended, that not the Heirs of Tailzie, but Sir *John*'s Heirs of Line or Executors were to be burdened with this Portion of 30,000 Merks or Interest thereof; especially when 'tis added, that tho' the Interest for the Daughters Portions is due from their Age of sixteen Years or Marriage, yet neither Principal nor Interest were exigible, but upon the Condition of the Failure of Heirs-male of the Marriage, *i. e.* till the Dissolution of the Marriage; and therefore, as the Case happened, that the Marriage was dissolved by Sir *John*'s Death, it could not be intended,

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that the Interest should be paid by him, but by the Heirs of Tailzie succeeding to Sir *John* in the Estate.

The Defender will add one further Observation, namely, That by the Contract of Marriage, the Father reserves the total Liferent of the Estate, and it was a possible Case, that the Father might have survived the Son; in such a Case, the Son had no Fund for paying the Annualrents of the Daughters Portions, that might have fallen due during his Life, the Father was not bound to pay them out of his Liferent; it was therefore reasonable, and accordingly 'tis provided, that the Heirs of Tailzie succeeding to the Estate, should pay the Portions, both Principal and Annualrents; and upon their Failure, the Father is authorized to sell as much of the entailed Estate, as would answer their Provisions, both Principal, Annualrents and Penalty.

And, *Lastly*, The Father and Son oblige them and their Heirs of Tailzie, to liberate the Daughters of the Marriage, and their several Portions, of all Debts and Burdens that anywise may or can affect them, as Heirs of Line to their Father, *i. e.* the Portions, Principal and Annualrents, were ultimately to be a Burden upon the Heirs of Tailzie, without any Relief against the Daughters or their Descendents, supposing them to be Heirs of Line to their Father, *i. e.* if the Father had no Heir-male of a second Marriage.

And with respect to the Reduction of the Feu of Part of the Town of *Greenock*, granted by Sir *John Schaw* to his Daughter, the Lady *Cathcart*, in the 1719, and renewed to this Defender her Son after her Death, and the Feus of the Mansion-house, Yards and Offices, and the other Feus granted to this Defender in the 1751, the Defender admits, that the Tailzie made in the Contract of Marriage 1700, and the Prohibition to alien, thereby imposed upon *John Schaw* the Son, may be explained, so as to prohibit him to grant Feus of any Part of the tailzied Estate: But then 'tis equally true, that this Construction is removed by the express Declaration

of

of the Parties, contained in the Reservation above recited; whereby full Power is reserved to Sir *John* the Father, and after his Death to *John* the Son, to grant *Feus of any Part or Portion of the said Lands*; whereby as Sir *John* the Father, who by the antecedent Rights of the Estate, as well as by the Tailzie, contained in the Contract 1700, was but a Liferenter, hath in this Respect the Power of a Fiar, and *John* the Son is left, as he was before, absolute Proprietor with respect to the granting Feus, of any Part or Portion of the tailzied Estate.

And to illustrate this Argument, it will be observed, that by another Clause of the Tailzie subjoined to this, Power is reserved to the Father and Son jointly to discharge the Prohibitions, irritant and resolutive Clauses, and to alter the Course of Succession thereby settled, with an Exception of the Succession stipulated to the Issue of the Marriage. Now suppose the Father and Son had altered the Course of Succession, and had settled the Succession in the legal Channel, upon the Descendents of *John* the Son in their Order, and had made the Son and his Issue unlimited Fiars of the Estate; in such a Case the Pursuer might at the same Rate have claimed under the Tailzie, and Limitations thereof, as he now pleads the Tailzie against the Feus granted by the Son pursuant to the reserved Power.

And when the Feus granted by Sir *John Schaw* the Son, are considered in this Light as granted by an unlimited Proprietor, who was in no Sort restrained as to this Exercise of his Property, the Power of granting Feus of any Part or Portion of the Estate of *Greenock*; there does not ly the Colour of a legal Objection to any of the Feus granted to the Defender or his Mother.—Is there any Rule in Law that excludes a Proprietor from feuing out his whole Estate? or where lies the Difference fixed by Law, between a Feu of his Dwelling-house and of his other Estate? or where lies the legal Difference between the Feu of a Dwelling-house, a Yard
and

and Stable, and a Feu of a rural Tenement? An unlimited Proprietor who is under no Restraint as to granting Feus of his Estate, grants all those Feus without Distinction, under the Authority of Law, and the Feuar hath the same legal Right to the one and to the other.

And as the Feus in Question are in this Light legal Exercises of the Powers reserved to *John* the Proprietor, so when these Powers are exercised in favours of Sir *John's* own Issue, who never offended him, but honoured him as a Parent, and for whom Nature obliges him to provide, this constitutes those Feus, not only legal, but favourite Rights; in the same Manner that the Settlement of a Man's Property upon his Heirs at Law is a Favourite of the Law, and especially when it comes in Competition with a Settlement in Favours of a Stranger, a remote Relation of a different Family.

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Add to this, that as Sir *John Schwarz* hath strictly conformed to the Regulations of the Clause, and in the Feus of Dwelling-houses, Yards, and Offices, he hath settled the Feu-duty in the Terms thereof; so in his Feus he hath not diminished, but augmented the Rent of the entailed Estate, particularly with respect to the Feus of the Town of *Greenock*, whereas the little Hutts that then composed the Town, yielded but a trifling and uncertain Rent, by Reason of the Poverty of their Inhabitants, and this Rent was scarce able to answer the Charge of Upholding: Now there is a very considerable yearly Feu-duty payable to the Pursuer, and absolutely secured upon large well built Houses, possessed by his Vassals and Sub-vassals.---- And the Mansion-house, which was ruinous at the Date of the Tailzie, and the Yards and Office-houses which were not then in being, yield now a Rent to the Pursuer.--- And with respect to the Feu of *Wester-Greenock*, which Sir *John* might have lawfully feued out at a low Rent, they are now liable in a Feu-duty considerably above the Rent, payable at the Date of the Feu, whereby in point of Profit the Heir of Tailzie suffers nothing by this reserved Power.

And

And as to the Distinction between urban and rural Tenements suggested by the Pursuer, that the first may be feued, but not the second; it is without Foundation in the Clause, which authorises the granting of *Feus of any Part or Portion of the said Lands*, clearly comprehending the whole Estate of *Greenock*, without any Distinction: And though the Restriction, with respect to the Quota of the Feu-duty, concerns only Dwelling-houses, Yards and Offices; this imports indeed a Limitation with respect to the Feus of these Subjects, but can by no Interpretation be construed to infer a Restriction of the Subjects to be feued, which is general of any Part or Portion of the Estate of *Greenock*: Wherefore as the Power of feuing extends over every Part and Portion of the Estate; and this Power is reserved to the Proprietor; it is contradicting plain Words, to restrain it to the Village of *Greenock*, or to Dwelling-houses, Yards and Offices; the Liberty of the Proprietor, and the legal Effects of Property are not to be restrained by Implication, and much less by destroying the express Words of his Right.

And as the Pursuer's Distinction is contrary to the Letter and Generality of the Clause; so it is contrary to the Meaning of the Parties to this Tailzie, as appears by the Feu of a Part of the Lands of *Breadstane*, granted by the Father in 1701 to *Ker of Kerland*, in Consequence of this reserved Power; it is a three Shilling four Penny-Land of old Extent, a rural Tenement, and feued at 40 s. of Feu-duty, and which has been possessed by the Feuar without Challenge to this Day. This affords a Demonstration, that the Parties did not intend to confine the Clause to urban Tenements; but that they had also a reserved Right to feu Lands, and that in such Feus they were under no Limitation as to the Quota of the Feu-duty: But that in this respect their Powers were absolute and unlimited; for the Feu-duty of those Lands feued by old Sir *John*, bears no Proportion to the present Rent, or to the Rent payable at the Time of the Feu.

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The Pursuer was also pleased to make certain Objections to the Form of the Feu-rights, such as the Taxation of the Relief payable by Heirs and singular Successors, the Discharge of the Irrirancy *ob non solutum canonem*. &c.

But to all these one Answer will be sufficient, that there is no Law that hinders a Proprietor to feu his Lands with these Conditions; and therefore they were not excluded by the reserving Clause; but Sir *John Schaws*, the Father and Son, might lawfully grant such Feus.

Again, it is objected that only the growing Corns of the Town of *Greenock* are thirled, the *investa* and *illata* are not. It is answered, 1st. There was no such Thirlage antecedent to the Feu, and therefore the not introducing the Thirlage by the Feu, was no Alienation of any Part of the entailed Estate. 2^{dly}. An unlimited Proprietor may grant Feus exempting the Feuar from all Thirlage whatsoever.

And the same Answer occurs to the Objection, that in the the Feu of the Houses in *Greenock*, the Feuars are freed from paying Anchorage or Shore Dues; Sir *John* was liable to none of those Dues before the Feu, and he might lawfully continue the Exemption with his Feuars.

And as to the Cess payable for the Houses and Yards; as Sir *John's* valued Rent was not augmented by the Feus, nor the Cess payable by him; and as his Rent was not diminished thereby, by the Nature of the Thing, the Cess remained a Burden on Sir *John* without Paction; and as the Houses and Yards have no separate valued Rent, they, upon that Account, cannot be subject to Cess; and the same Reason applies to the Expence of repairing the Kirk and Manse, which affect only the Parishioners in proportion to their valued Rent.

And as to the Streets and Vennels of the Village of *Greenock*; as they belong to the Publick, and were improperly feued out to the Lady *Cathcart*, they were properly excepted from the Renovation of the Feu granted to the Defender upon his Mother's Death.

And

And with respect to the Reasons of Reduction of certain Tacks for the Term of 19 Years of the same Parts of the entailed Estate, that are feued to the Defender; as the Validity of those Tacks depends upon the same Clause upon which the Feus above stated do depend, 'tis unnecessary to repeat the Argument upon that Head; it will be sufficient to observe, that the Tacks contain an Augmentation of the former Rental, and are only for the Term of 19 Years, and thereby they do not fall under the Restrictions in the Entail; and they would be valid and effectual without the Aid of the reserving Clause.

In the *next* Place, the Pursuer insists in a Reduction of a Contract of Sale of the Woods and Planting upon the entailed Estate entered into between Sir *John Schaw* and the Defender, of this Date, whereby Sir *John* in the usual Form, sells the growing Timber upon the Premises to this Defender, at the Price therein covenanted, and whereby the Defender is obliged to cut the Woods in the regular Manner, and to clear the Ground thereof against the first of *January* 1763; that this was a heinous Injury to the Heir of Tailzie, and it will receive no Countenance from any Court; that Sir *John* could not more than a Liferenter, authorise the cutting of the Woods after his own Death.

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'Tis answered, That Sir *John Schaw*, notwithstanding of the Restrictions, was really Proprietor, and had Right to take the full Profit of the Estate during his Life, and consequently he had Power to sell the Woods, and this falls under no Prohibition of the Entail; 'tis no Alienation of the Estate; and as he had Power to sell, he had Power to sell with the common Conditions, allowing the Purchaser a reasonable Time for cutting the Woods, so as the Market might not be overstocked; and if the Wood was lawfully sold by Sir *John* the Proprietor, his Death could not dissolve the Bargain, no more than if he had sold the growing Corns upon the Lands in his natural Possession.

But,

But, 2^{dly}, Most of the Woods and all the Planting sold, is upon the Lands feued out to the Defender; and consequently, though they had not been sold, they belong to the Defender, and not to the Pursuer the Superior; and therefore the Pursuer has no Interest to enquire in what Manner the Defender will dispose on the Woods or Timber growing upon his Feu.

In Respect whereof, &c.

RO. CRAIGIE.

